THE NEW-YORK

CITY-HALL RECORDER.

VOL. V. *January and February*, 1820. NOS. 1 & 2.

AT a COURT OF GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 3d day of *January*, in the year of our Lord one thousand eight hundred and twenty.

PRESENT,

The Honourable
CADWALLADER D. COLDEN, *Mayor.*

JOHN MORSS, and GEORGE B. THORP, } *Aldermen.*

P. C VAN WYCK, *Dist. Att.*
JOHN W. WYMAN, *Clerk.*

(COUNTERFEITING.)

JAMES GALLAHER AND JAMES M'ELROY'S Cases.

VAN WYCK, *Counsel for the Prosecutions.*
PRICE, RODMAN and SCOTT, *Counsel for the Prisoners.*

Though a man may have been deceived in receiving a counterfeit bill, having paid for it the full consideration, yet, if he has afterwards *reasonable grounds* for believing it to be counterfeit and passes it, he subjects himself to the punishment prescribed by law for passing counterfeit money knowing it to be counterfeit.

It is not necessary in such cases for the public prosecutor to show that the prisoner knew, to an absolute certainty, that the bill so passed was counterfeit.

M, who had been deceived by a counterfeit bill, passed it to A, in New-York, who gave him a draft on a house in Philadelphia, but shortly afterwards, discovering the bill to be counterfeit, directed his Philadelphia correspondent to withhold payment, and when M called refused payment, who commenced a suit for the recovery of the money; and, on the trial, A produced ample testimony, establishing that the bill so passed was a counterfeit and a verdict was rendered in his favour. M afterwards obtained possession of the bill, showed it to several persons, some of whom told him it was good and others that it was bad. G at the instance of M. and in consideration of $5, to be spent between them, passed the same bill: it was held that the result of that suit furnished reasonable grounds for M and G to believe the bill counterfeit; but as G was a volunteer in the passing of the bill, and M had been originally deceived and had lost the amount, the jury convicted G but acquitted M.

Where a man who had reasonable grounds for believing a note bad, carried it to another and told him he wanted to know if it could be discounted, and left it for examination, this is not a passing with an intent to defraud.

The prisoners were indicted separately for forging and uttering a counterfeit bill of $100 on the Louisiana Bank, on the 13th day of November last.

The bill upon which the indictment was founded, was in the English language on the left hand, and in French on the right, as follows:

"No. 580.

The President, Directors and Co. of the Louisiana Bank, promise to pay f Duplesses or bearer, on demand, one hundred dollars. New-Orleans, 4th March, 1815.

"Le President Directeurs & Co. de la Banque de la Louisiane payeront a f Duplesses ou au porteur sur demand cent piastres. N. Orleans, 4 Mars, 1818.

Thos. Urquhart, Pres't.
Thos. ss Harman, Cash'r."

The evidence as applicable to both cases, which were tried on the 7th of January instant, was in substance as follows:

During the month of August last, M'Elroy, one of the prisoners, an aged man, of a respectable appearance and good character, residing in Philadelphia, where he kept a livery stable, brought for sale, a valuable horse to this city. He sold the horse to a stranger for $140 and received the bill in question as part payment; but did not deliver the horse before he had made inquiry whether the bill was good. For that purpose he went with William Heron, at whose stable the horse was kept, through Division-street

and called on a number of persons said to be good judges, among whom was Phineas Lounsberry, who pronounced the bill good. They also went to several brokers in Wall-street, who passed the same judgment.

Afterwards, M'Elroy went into Wall-street to get the bill discounted, but considering the rate charged to be too high, he carried the bill to the lottery office of Moses Allen in Broadway, who, being particularly in want of New-Orleans bills, offered to discount this at ten per cent. The prisoner having acceded to the offer, wished Allen to pay him in Philadelphia bills; but not having them, he offered him a draft for $90 on the house of his partner in that city, which the prisoner accepted. A short time after he had left the office, a man meanly attired, brought to Allen for discount another bill of the same denomination and impression and on the same bank. This bill Allen immediately discovered to be counterfeit; and, on examining the bill taken of the prisoner, found it also bad. Allen, thereupon, wrote immediately to his partner in Philadelphia, enclosing the bill, and directing him when the draft should be presented, to pay it with the bill enclosed.

In two or three weeks M'Elroy came to Allen with the draft, and asked him if he would pay the amount in money. Allen told him that the bill was a counterfeit, and refused payment.

The prisoner indignantly left the office and commenced a suit against Allen in the Marine Court to recover the money. He defended the suit on the ground *that the bill for which the draft was given was a counterfeit.* To establish this allegation, he produced as witnesses on the trial, Messrs Peter and Samuel Maverick, brothers, the engravers of the plate from which the genuine bills on that bank were formerly struck, who concurred in stating that the bill in question was not struck from the plate engraved by them. Samuel Packwood was also introduced by Allen as a witness, and testified that he was well acquainted with the bills of the Louisiana Bank, and with the signatures both of the President and Cashier. The latter gentleman, who had been Cashier of that Bank four or five years, was formerly the President of the Planter's Bank in New-Orleans, of which the witness was a director. He had often seen him write, and believed the signatures on the bill both of the President and Cashier to have been forged. After this, with other evidence was produced, Allen succeeded, and judgment was rendered in his favour.

The testimony of the Mavericks and that of Packwood was, in amount, the same on this trial; but, from the cross-examination of Peter Maverick, it appeared that the witness and his brother made the plate for the Louisiana Bank twelve or fourteen years ago, since which time another plate had been made by some other engraver from which bills recently issued are struck. It also appeared from the testimony of all the witnesses sworn on behalf of the prosecution on the point of the forgery, that the bill was a very exact imitation of the true bills.

Sometime after the trial had taken place, M'Elroy called on Allen for the bill, alleging that he wished to return it to the man from whom it came if he could be found. Allen wrote a note to the attorney, in whose hands the bill was lodged who delivered it to the prisoner.

It appeared that he afterwards sent the bill by Sloan Chrystie to several places to ascertain whether it was good. The prisoner, M'Elroy, afterwards went to the store of Edmund P. Brady, in Catharine-street, and asked John Redon, a clerk, what the discount on the bill would be, requesting him to discount it as he was going to sea, and would trade out fourteen or fifteen dollars. Redon told him that he could not discount it; and the prisoner left it with him to have it examined. Redon, on the return of Brady, gave him the bill, who satisfactorily ascertained that it was bad; and it was returned, with that information, by Redon to the prisoner, M'Elroy.

At the grocery store of Barnard Kyle, in Bancker-street about the 15th of December last, M'Elroy, had a conversation with Gallaher, the other prisoner, in presence of Kyle, wherein M'Elroy related the history of his misfortunes in relation to the bill, spoke of the result of the suit, and of his attempt to pass the

bill to Brady; and it was finally agreed between the prisoners, in consequence of the voluntary offer of Gallaher, that he should endeavour to pass the bill, and if he succeeded, that $5, a part of the money, should be spent between them.

Gallaher, the next morning, went with the bill to the clothing store of Robert Banks in Catharine-street, and told Dennis Keenan, the foreman, that he wished to purchase a suit of clothes, and he selected a pair of pantaloons, a pea coat and a coat amounting to $17, and offered the counterfeit bill. Keenan examined the bill, which the prisoner said was good; and, in confirmation of that assertion, produced a letter, and said that he had recently received an inclosure of $100 from his brother at New-Orleans. Whereupon, Keenan delivered the bill to Banks, telling him to take out $17, but examine the bill. Banks sent it to the store of Brady, directly opposite, and he immediately recognised the bill, and detained it. The prisoner came and earnestly solicited Brady to deliver him the bill; but he refused and in a short time had the prisoner apprehended, and left the bill in the police.

In the case of Gallaher, which was first traversed, after the arguments of the respective counsel, the Mayor in his charge to the jury instructed them, that in the opinion of the court, the guilt or innocence of the prisoner did not depend on the question, whether M'Elroy received the bill for a good consideration and was deceived; for if from the facts, which occurred subsequent to such reception of the bill, the jury should believe the prisoner had *reasonable grounds* for believing the bill counterfeit, though he may not have had a certain and absolute conviction on the subject, he was amenable to the punishment prescribed by the statute. A man, though he has been imposed on by counterfeit money, has no right to impose on others; and if M'Elroy himself, if on trial, would not be excusable, much less is the prisoner. With a full knowledge of the facts in relation to the bill he volunteered to pass it in consideration of $5, to be spent between himself and M'Elroy.

After recurring to the circumstances relied on by the prosecution to show that the prisoner knew the bill to be counterfeit, the Mayor left the case to the jury, who found the prisoner guilty, and, on the last day of the term, he was sentenced to the State Prison five years.

In the case of M'Elroy, after the respective counsel had addressed the jury, the Mayor in his charge instructed them, that should they believe from the evidence that this bill was a forgery, and of this there was no reason to doubt, the next and the principal question for their consideration would be, whether the prisoner passed it with an intent to defraud. And, on this point, it is not necessary that the jury should believe that he actually did defraud. If the testimony is to be believed, he passed the bill in two several instances: first to Redon, and second to Gallaher. But it is well worthy the consideration of the jury, whether, when the prisoner passed the bill to Redon, it was with an intent to defraud. When the prisoner brought the bill to the store, he wanted to know if it could be discounted and left it for examination. True it is, he said that he was going to sea; but this declaration, though improbable, is not contradicted. If the verdict depended on this branch of the case, in the view of the court, the prisoner ought not to be convicted. Did he pass the bill to Gallaher, knowing it to be counterfeit and with an intent to defraud; for this latter branch of the inquiry is involved within the other. On the point of knowledge, perfect certainty is not requisite: it is sufficient if the prisoner had reasonable grounds for believing the bill bad. This doctrine had been recently established by the late Chief Justice in a case tried in the Oyer and Terminer in Ontario county, and was well settled law. In cases of this description, false and inconsistent statements made by the prisoner, are generally relied on by the public prosecutor; but in this case the testimony does not afford them: and the good character of the prisoner will have that weight it deserves with the jury. Should they believe from the facts and circumstances in the case that the prisoner passed this bill to Gallaher, knowing it to be bad, it will be their duty to convict otherwise to acquit the prisoner.

He was acquitted.

(MISDEMEANOR—DUTY OF A PEACE-OFFICER.)

JOHN WARK'S CASE.

VAN WYCK, *Counsel for the prosecution.*
PRICE and DAVID GRAHAM, *Counsel for the defendant.*

A peace officer is not bound to arrest and detain a man as a felon, merely upon the representation made by another that he is a thief; especially when the goods alleged to be stolen are not in his possession.

The defendant, a marshal, was indicted for a misdemenor at common law, in refusing to arrest a woman who had committed a felony in stealing a coat, and for suffering and permitting her to escape; the defendant well knowing that the coat was stolen. He was tried on the 14th of January instant.

It appeared from the testimony of James Calhoun, that he saw, at the corner of Leonard and Orange-streets, *in this city*, a woman in possession of a coat, followed by a little girl who charged her with having stolen it. He took away the coat having found in the pocket papers belonging to Dr Kissam, which he witness, left at his house. The woman refused to go with the witness to the police. He met one White on whom he called for assistance, but he referred the witness to the defendant, then passing, as an officer, to whom he related the business, and informed him that he believed the coat had been stolen. The defendant told him to go to the police and get a warrant. The witness requested him to keep the woman until he returned, and left her in his charge; but, in the absence of the witness, the defendant suffered her to escape.

The counsel for the defendant contended that this indictment was not supported. The officer had no authority, nor was he bound, to detain the woman upon the representation of the prosecutor. Mr. Graham cited 3 Inst. 118, and 1 Chitty's Crim. Plead. P. 21.

Van Wyck contra.

The Mayor, in pronouncing the decision of the court, said that he had no doubt but that upon a hue and cry, when property had been stolen, an officer was bound to arrest the offender. But in this case no such question arises. The property was not with the woman charged with the felony, but was left at the house of the witness, who informed the defendant that he believed it had been stolen.

In the opinion of the court, this representation did not afford sufficient evidence to induce the defendant either to arrest or detain the woman.

The defendant was acquitted.

(LARCENY—OWNERSHIP.)

WILLIAM W. VEITCH'S CASE.

VAN WYCK, *Counsel for the prosecution.*
ANTHON, *Counsel for the defendant.*

Property having been assigned for the benefit of creditors, and sent by the debtor, as agent for assignees, to auction, for sale, was stolen, and in the indictment the ownership was laid in the debtor; it was held that the ownership ought to have been laid in the assignees.

The prisoner, a young man of good appearance was indicted for grand larceny on three several indictments.

The first traversed was for stealing a large quantity of hardware, specified in the indictment, the property of *John Hewett*, on the 22d of December last. The prisoner was tried on the 10th of January.

It appeared that the property was stolen from an auction store in this city, where it had been sent for sale by Hewett, in pursuance of the order of his assignees, to whom it had been duly assigned for the benefit of his creditors.

On an objection to the indictment by the counsel for the prisoner, it was held by the Mayor, who so charged the jury, that the property ought to have been laid in the assignees. On this charge he was acquitted.

One of the other indictments traversed was for stealing carpenter's tools and other articles of hardware, to the amount of several hundred dollars, the property of John Edgar.

These goods were stolen at different times: the prisoner had frequent access to the store; and the principal part of the property was afterwards found at the

auction store of Seaman & Co. where it had been carried by the prisoner for sale. It appeared he had been in the habit of buying and selling at auction; but he gave no satisfactory account of the manner in which he became possessed of the articles. He was convicted on this and on a charge for stealing two fowling pieces, a spy-glass, a pair of pistols, and other articles from the auction store last mentioned; and on the last day in term, he was sentenced to the state prison five years.

SUMMARY.

GRAND LARCENY.

Isaac Richardson was convicted by verdict of this offence, in stealing the property of Francis Henrietta, and sentenced to the state prison four years.

William Harry was convicted, by confession, of stealing the goods of Henry Packard, and sentenced to the state prison three years.

PETIT LARCENY.

William Francis, Ezekiel Wilkes, Edward Dupoy, Charles Hamilton, Silas Cooper, Rudolph Taffey, John Johnson, John Dillon, Sandy McLaughlin, Stephen King, David Pugsley, Mary Menix, Anthony Smith, Elsey Tanner, Julia Butler, Mary Smith, John Frisbie, Bartholemew West and Jos. Williams; for these offences were severally convicted and the one first named was sentenced to the penitentiary three years, the two following two years each, the ten following for eighteen months each, the four following for fifteen months each, Frisbie for six months and the last was fined $50 and the costs.

PERJURY.

Charles Tomlinson, convicted of this offence during the term of October last, on the last day of the December term following, was sentenced to the state prison seven years.

FEBRUARY TERM.

PRESENT,

The Honourable
CADWALLADER D. COLDEN, *Mayor.*
ASA MANN, and GEORGE B. THORP, } *Aldermen.*
P. C. VAN WYCK, *Dist. Att.*
JOHN W. WYMAN, *Clerk.*

(FRAUD—CONFESSION.)

ROBERT W. STEEL'S CASE.

RODMAN, *Counsel for the prosecution.*
PRICE and SCOTT, *Counsel for the prisoner.*

Though the false pretence charged must be the sole inducement to the parting with the goods, yet every accidental circumstance which, in conjunction with the false pretence, influenced the delivery, need not be alleged.

Where one by a false pretence, obtained property in which he succeeded with the greater facility by reason of his being recognized by the prosecutor as having been in his store before, it was held that this was but a circumstance incidental to the delivery, and not such an inducement as required notice.

A voluntary confession in the case of a misdemeanor, reduced to writing before a magistrate, though not a confession authorized to be taken by him under the statute, as in a felony, may be read in evidence.

Where the complaint of the prosecutor was reduced to writing in the police, and the confession of the prisoner followed, stating that "*the charge in the foregoing affidavit is true*," and further "*that he obtained goods by false pretences from several persons* not named in the indictment, it was held that such confession, so referring to an affidavit which neither was nor could be given in evidence, should have no influence with the jury.

The prisoner was indicted for a fraud, in obtaining two kegs of white lead and one of verdegris, the property of Jones & Clinch, by representing to Clinch, one of the partners, that he, the prisoner, was a hand on board the brig Warrior, and that Mr. Mix the mate of the brig had sent him to Jones & Clinch for paints and oil.

The testimony of Jacob Clinch fully supported the charge against the prisoner, so far as to his obtaining the property by means of the representation stated in the indictment; but in the

course of his testimony this witness further stated that the prisoner had been to the store several times before the time the goods were obtained, and that this operated as an inducement to the parting with the goods; but the witness could not have delivered them had not the prisoner made the representation before mentioned.

The witness further testified that he had a conversation with the prisoner in Bridewell, and stated to him that it would be better for him to disclose the whole, and he then confessed that there had been a combination among several persons, of whom he was one, but the dupe of the others, to obtain property by fraud; and that goods, as well of the prosecutor as of others, had been so obtained to a great amount and sold by one Ward.

After the introduction of this testimony Rodman offered to read the examination of the prisoner taken in the police.

Price contended to the court that an examination of a prisoner in the police, in the case of a misdemeanor, not being authorized by statute, as in a case of felony, was not good evidence: that the confession made to the prosecutor was made under the influence of a promise: and that any confession subsequently made in the police should be presumed as having been made under the same influence continued, or at least, while the prisoner was under duress of imprisonment.

Rodman contra.

The Mayor pronounced the decision of the court, that although the statute does not authorize the magistrate to take the examination of a prisoner in the case of a misdemeanor as in a felony, still a voluntary confession reduced to writing before a magistrate or any other person, is to be regarded as the act of the prisoner, and therefore is good evidence. Whether the confession made to the prosecutor in Bridewell was made under the influence of a promise of favour, and, if so, whether that influence continued its operation on his mind when he was examined in the police, are questions for the jury. It is not to be presumed that any threats or promises of favour were made in the police; and there is no more reason in this case for the suggestion that the confession was made there under duress of imprisonment, than there would be in any case in which the examination had been taken, pursuant to the statute, in a felony.

Charles Christian, one of the police magistrates, on being sworn as a witness on behalf of the prosecution, testified that the examination of the prisoner was reduced to writing by the witness on the first of February instant: that the prisoner declined to sign it, and that so far from its having been made under the influence of any threat or promise, the witness told him that he need not cherish any hopes of being made a state evidence against his accomplices in the fraud.

The complaint of the prosecutor, taken in the police, detailing the circumstances of the fraud, as stated in his testimony, was followed by the examination of the prisoner, stating "*that the charge in the foregoing affidavit is true;*" and the examination then proceeds to show a combination, between the prisoner and several other persons named, to obtain goods by false pretences, and that, in pursuance of such confederacy, they did obtain goods by such means, from persons not named in the indictment

The examination having been read, the evidence was closed, when it was contended by the counsel of the prisoner to the jury that the false pretence charged in the indictment must be the sole inducement to parting with the property. But, in this case it appears that the prisoner was recognized by the prosecutor as having been there before; and this was an inducement for parting with the property.

The counsel further insisted that the confession made to the prosecutor was under the influence of a promise: that there was no legal evidence in the case, independent of the confession in the police, that the prisoner was not a hand on board the vessel and had not been sent by the mate for the property he was charged of obtaining by false pretences. The counsel contended that it was a rule applicable to this as well as a case for larceny, that the felony should be proved

to have been committed before the confession was introduced.

Rodman contra.

The Mayor stated to the jury in his charge that this case was not without its difficulties. That in cases of this description it was not sufficient to charge generally that the prisoner obtained property by false pretences; but that these must be specifically alleged. Here the Mayor refered to the charge in the indictment.

It is true that it must appear that the false pretence charged in the indictment was the sole inducement to the parting with the property. This had been frequently decided in this court; and in particular in a case tried in April term last.* Davis was indicted for obtaining $2000 from Hitchcock & Scribner by falsely pretending to them that a certain bill of exchange for $3000 in favour of the defendant, and endorsed by Binney & Ludlow, had been sent to Boston and accepted. From the testimony of Hitchcock it appeared that the defendant being previously indebted to the firm for brandy purchased on credit, and the time of payment not having elapsed, was very solicitous for the loan of $2000, and after having made the false representation charged in the indictment, offered the witness a check endorsed by Foster & Co. for $1500, in anticipation of the payment for the brandy. This the witness accepted and advanced the money, which he would not have done merely on the representation relative to the bill of exchange. There it was decided, and rightly, that the prosecution could not be sustained. The false pretence alleged in the indictment was not the sole inducement for advancing the $2000. But in this case that principle is not applicable. In this indictment it is alleged that the prisoner falsely pretended that he was a hand on board the vessel, the mate of which had sent him for the goods, and that by means of such false pretence the prosecutor delivered them. He states in his testimony he delivered the goods by reason of the representation, without which he would not have done so; but that he recognized the prisoner as having been in the store before, and this operated as an inducement for the parting with the goods.

This cannot be considered a false pretence requisite to be noticed in an indictment; it is a circumstance of the same nature as an appearance of dress by means of which a man is the more easily imposed upon by the false pretence.

But the testimony of the prosecutor, laying out of view the confession made to him in Bridewell, is insufficient to support this prosecution; and without this confession, or that taken in the police, the prisoner cannot be convicted. For it is not otherwise proved that he was not a hand on board the Warrior, and was not sent for these goods by the mate.

It is contended on his behalf, that it was incumbent on behalf of the prosecution before introducing either confession to prove that the offence was committed. The rule alluded to is misapplied; it is true you cannot convict on a confession merely unless it otherwise appears that an offence was committed; but it is immaterial what part of the evidence is first introduced.

The confession made to the prosecutor in Bridewell, in addition to his testimony, appears to be amply sufficient to support this prosecution; but we ought to be cautious in receiving a confession made under the influence of threats or promises. Previous to the confession in Bridewell, the prosecutor without holding out any specific promise, or making any threat, merely said to the prisoner, "now you had better confess." It is submitted to the jury whether this is such a promise as destroys the effect of the confession which followed.

That confession is the only one on which the jury can rely; and if it is rejected, the prisoner must be acquitted.

The one taken in the police is preceded by a document which neither was nor could be given in evidence. It is said in this confession that "*the charge in the foregoing affidavit is true*." That charge is not before us. In a subsequent part of the confession it is stated, that he obtained goods by *false pretences* from this one and that one; but this general ac-

* See this case reported 4th volume of the City-Hall Recorder, P. 61.

knowledgment is not what we want, for Clinch had sworn to the same before. We want to be satisfied that he was not a hand on board of the brig, and that the mate did not send him for the goods.

Should the jury think with the court, that this confession is not to be received, their verdict must depend on the question whether the confession was made under the influence of a promise. If it was, the prisoner ought to be acquitted; otherwise, convicted.

He was convicted and sentenced three years to the penitentiary.

(LARCENY—INTENT TO STEAL.)

WILLIAM HADLEY'S CASE.

VAN WYCK, *Counsel for the prosecution.*
PRICE, *Counsel for the prisoner.*

When a prisoner intending to steal fowls, broke open a hen house in the night, and being caught by the owner in the hen house, fled and carried away the padlock by which the door was secured, it was held that he could not be convicted of stealing the lock, if either through alarm or from any other motive than an intent to steal he took it away.

Quere. Whether a padlock by which an out house is secured, is a fixture attached to the freehold.

The prisoner, a miserable old vagabond, was indicted for petit larceny in stealing a padlock of the value of twenty-five cents, the property of Jacob Conklin, on the 7th of January last.

The prisoner came at night, and broke open the hen house of the prosecutor who was awakened by the fowls, and, on going out caught the prisoner among them, who suddenly passed him and escaped. The next morning the prosecutor discovered that the lower hinge being of leather was cut; and this not affording an entrance through the door, the padlock by which it was secured was broken off and was missing.

Price insisted that the lock was a fixture, and being a part of the freehold was not the subject of a larceny.

The Mayor left this as a question for the jury, but suggested for their consideration, as a thing of greater importance, a second question: whether the prisoner took this lock *with a felonious intent.*

It is not every wrongful taking away which constitutes a felony. Several years ago, a negro on Long Island, who ran away from his master, took a boat for the purpose of crossing the sound, and come with it into this city. He was indicted and tried for larceny in stealing the boat: the question was well argued; but it was held by Judge Benson, who tried the case, that the prosecution could not be supported.

The property must have been taken feloniously; and it in this case the jury should believe that the prisoner separated this lock from the door for the purpose of stealing the fowls, and had not an intention of stealing the lock, he ought not to be convicted. There is no evidence that he carried it away; but even if he did, either through fear or alarm, or from any other intention than that of stealing, he ought to be acquitted.

The Jury acquitted him.

LIBEL—CONTEMPT.

IN THE MATTER OF HARVEY STRONG, ON THE COMPLAINT OF HENRY BREVOORT, JUN.

GRIFFIN, *Counsel for Brevoort.*
FAY and SCOTT, *Counsel for Strong.*

The court will not proceed by attachment against an individual for a contempt in sending a private letter to another who is the prosecutor in a case of libel pending against the writer of the letter, however scurrilous and abusive it may be, and though it may relate to the subject matter of the libel, unless it clearly appears that it was designed to interrupt the administration of justice.

On a proceeding for an attachment, the affidavit filed by the party aggrieved, to show cause, is to be taken as true; but if it be evasive, and does not directly meet the charge alleged, the court will require him to answer interrogatories.

For a defendant in the case of a libel to whisper the interjection *pish* to the prosecutor, attending as a witness in the presence of the court, but at the time without its notice, in answer to a stern look of the prosecutor, intended to insult the defendant, is not a contempt of court.

During the term of July last, four in-

dictments for libels were found by the grand jury against Harvey Strong for sending certain private letters, alleged to be libellous, to Henry Brevoort, junior. These cases were pending in this court until the 10th day of February instant, when they were removed by the defendant into the supreme court by certiorari.

The next day Griffin read an affidavit of Henry Brevoort, junior, stating that yesterday, while he was attending court as a witness in those cases, and while he was passing near Strong, within the bar, he audibly hissed at the deponent in such a manner as to be distinctly heard, not only by him, but by any by-stander who might be near—that he shortly afterwards left court to go home and that Strong followed him, and in the Park abused him by calling him a liar, scoundrel and coward, challenging him to fight, and accusing him of bribing witnesses.

This affidavit was supported by that of William F. Cary and Matthew C. Patterson; and on reading them Griffin moved for a rule against Strong, to show cause, the next day, by the opening of the court, why an attachment should not issue against him.

The rule was granted.

On the next day Griffin moved for an attachment, and also read another affidavit of Brevoort, annexed to two several letters, purporting to have been written by Strong, one of them being dated on the 8th and the other on the 17th of July last. The affidavit stated that the letters were received through the post-office unsealed; and the deponent verily believed they were written and sent with an intention to intimidate and deter him from testifying or proceeding on the several indictments for libels.

The letters contained nearly six pages of very abusive and scurrilous matter against Brevoort, and in the one last mentioned, a threat is made of publishing a pamphlet against him, which would contain the following extract: "He is still the same *low live* creature which nature and education made him; and while he would deck himself in the lights of some few and fugitive rays of genius it is *said* he has at times exhibited, and some *pride of fortune a happy match* produced him, he still is not, and cannot be by the force of nature, and all the contrivance and tricks of vanity to set off his exterior condition, any thing more nor less than the sturdy *insolent thing* his mother nursed him on her knee, as she peddled her *turnips* and her *toys* in the Fly market; and little, while she turned for the moment from *haggling* for the odd penny on a peck dish of potatoes, to sooth his mawlings with the nutriment of nature at her bosom, did she think her little *starved brat* would one day in fortune's frolics, ape the dignity and consequence of the gentleman, and wring even *her* heart with the cruel infamy of his preposterous gambols.

"I am going to Europe before long, and shall take a sufficient number of the pamphlets with me. I have already furnished some friends I have at the college of Edinburgh with a copy of the publications that have appeared at their request, they having heard of your pranks; and there has been some *sport* there at your *expense*."

The other letter contained the following passage: "I am aware that a complaint has this day been made before the grand jury by you and Cary against me. Go on, sir, but not all the persecution of the most savage inventive malignity, shall prevent the exposure your vile conduct to me has provoked, and rendered indispensably necessary in defence of my reputation, which is dearer to me than life."

Fay, in showing cause against the rule then already granted, read an affidavit of Strong, stating that he, the deponent, did not hiss Henry Brevoort in the manner mentioned in the affidavit; nor did the deponent follow Brevoort from this court; the meeting was accidental, and Brevoort first assailed the deponent by calling him a scoundrel in the street; that at the time alluded to, in this court, Brevoort passed near this deponent just as the court had denied his application to bind the deponent over to keep the peace. And the said Brevoort looked with sternness as he passed, and evidently intended by his looks, to insult this deponent;—and this deponent, in return, merely said in a whisper, "*pish*," and nothing more; that in this he meant no disrespect or contempt of this court or its authority.

Griffin insisted that a rule to show cause ought to be granted on the affidavit annexed to the letters, as their object manifestly was to intimidate the prosecutor and prevent him from proceeding. And the counsel further argued, that admitting the facts contained in the exculpatory affidavit to be true, still, the word pish, uttered in the presence of the court to the prosecutor, was highly contemptuous. The affidavit is evasive; and notwithstanding it denies any intentional disrespect to the court, they were bound to judge whether the matter was a contempt or not.—He cited, 1 Hawk. P. C. p. 90. Atkyns p. 469, 471, and 1 Caine's 485.

Fay and Scott, contra.

The mayor delivered the opinion of the court, that however scurrilous and abusive the letters read may be, there was but one passage in either of them which by any possibility could be construed into a design to impede the public administration of justice: "I am aware that a complaint has this day been made before the grand jury by you and Cary against me," &c. And taking the succeeding matter in connexion with this, we are warranted in saying that such design is not clearly apparent. These letters, no doubt, contain gross libels on the prosecutor and his mother.

There is another remedy, and we should be extremely cautious in proceeding in a summary manner, where the party is deprived of a trial by jury, unless the matter of contempt clearly appears.

With regard to the question whether the rule to show cause should be made absolute in the other matter, it is a sound principle that the affidavit in exculpation and in answer to the charge, must be taken as true. Should it be evasive, and not meet the charge directly, and the court should judge interrogatories necessary for the purpose of obtaining an explicit answer to the matter alleged, they may order them filed. But in this case, the charge is sufficiently met: it is alleged that Brevoort passed Strong and cast a stern look at him, evidently intending to insult him, and that by way of answer to the contemptuous look, Strong whispered *pish* and nothing more. And this passed without the notice of the court at the time. We do not consider this a contempt requiring the interposition of the court, and therefore deny the motion for a rule to show cause why an attachment should not issue on the affidavit annexed to the letters, and order the rule already granted to be discharged.

(BURGLARY—DWELLING-HOUSE.)

WILLIAM WOOD'S CASE.

PRICE, *Counsel for the prosecution.*
RODMAN, *Counsel for the prisoner.*

To break into a store from which there is a communication into a room occupied for sleeping, by a clerk, belonging to the family of the owner of the store, whose family resides at a separate place, is a burglary.

The prisoner was indicted for a burglary, in breaking and entering the dwelling house of Ezekiel Miles, in the ninth ward of this city, on the night of the 1st of February, and stealing $150 in silver coin.

It appeared that the prisoner broke and entered the store of the prosecutor, at the corner of Perry and Greenwich-streets, at the time stated in the indictment. His family resided at a place separate from the store; but two of his clerks, members of his family, slept in rooms from which there was a communication into the store. The prisoner confessed that he broke the store and stole the money.

Rodman insisted that this was not a burglary, for the prisoner did not break the *dwelling house*. The counsel cited 3 Chitty's Crim. Plead. 1091.

Price, contra.

The mayor said there was no case better settled than that this was a burglary. He so charged the jury, who convicted the prisoner, and on the last day of the term, he was sentenced to the state prison for life.